

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 21/11/2002

Coram

The Honourable Mr. Justice M. KARPAGAVINAYAGAM

SECOND APPEAL No.504 of 1999

1. P. Chikkaraj
2. Lakshmithai
3. Devirammal ..Appellants

-Vs-

1. K.N. Dhanalakshmi
2. Minor Prabhakaran
rep. by his mother and
natural guardian first
respondent K.N.Dhanalakshmi ..Respondents

Second Appeal against the judgment and decree dated 1.7.1998 made in A.S.No.40 of 1997 on the file of the II Additional District Judge, Erode reversing the judgment and decree dated 8.3.1996 made in O.S. No.240 of 1990 on the file of the Sub Court, Gobichettipalayam.

!For Appellants : Mr.S.V. Jayaraman, S.C. for
Mr.N. Damodaran

^For Respondents : Mr.T. Murugamanickam

:J U D G M E N T

The appellants 1 to 3 are the defendants.

2. Dhanalakshmi, the first respondent herein, is the wife of Chikkaraj, the first appellant herein. On her behalf and on behalf of her minor son Prabhakaran, the second respondent, as his natural guardian, filed the suit in O.S.No.240 of 1990 praying for granting maintenance of Rs.500/- per month and for division of the suit properties into six equal shares and to allot two such shares to the second respondent being the son of the first appellant. The said suit was dismissed by the trial Court. However, the appeal filed by the plaintiffs/ respondents before the lower appellate Court was allowed and the suit was decreed in favour of the plaintiffs. Hence, this second appeal by the defendants/appellants.

3. The case of the plaintiffs is as follows:

"The first plaintiff Dhanalakshmi got married to Chikkaraj, the first defendant in November, 1982. The defendants 2 and 3 are the sisters of the first defendant. Since the date of marriage, they were living in Door No.71, Orumanaicknen Street, Sathiyamangalam, the husband's place. Out of the said wedlock, Prabhakaran, the male child was born on 1.6.1988. Till then, they were living together. At the instigation of the defendants 2 and 3, the first defendant attempted to drive away the first plaintiff from the said premises. So, she filed the suit in O.S.No.1087 of 1987 against all the three defendants seeking for declaration of her right of residence in the property along with the first defendant and permanent injunction restraining the defendants from sending the first plaintiff out of the suit property by force. Since the suit was not contested, the same was decreed ex parte. Then, the first defendant filed O.P.No.63 of 1987 seeking for divorce which was dismissed for default. In the meantime, the second plaintiff was born on 1.6.1988. Despite the decree, she was not allowed to live in the premises. Therefore, she joined with her parents along with the child. In the meantime, on 12.11.1987, the first defendant issued a notice to the plaintiff intimating that he would propose of file a petition for divorce and that the partition of the properties among co-sharers have already been done. Reply was sent stating that the second plaintiff, the minor son was born and as such, the alleged partition would not bind upon the plaintiffs. Thereafter, the suit was filed by the plaintiffs for maintenance as well as for a decree over the division of properties into six equal shares and to allot two shares to the second plaintiff."

4. The suit was contested by the defendants by contending as follows:

"Though marriage was held between the first plaintiff and the first defendant in November 1982, the first plaintiff lived till December 1 1983 with the first defendant. Thereafter, the first plaintiff has been living with her parents and as such, the second plaintiff was not born out of that wedlock. There is enmity between the first plaintiff's father and the first defendant, since the first plaintiff's father initiated proceedings against the first defendant for recovery of amount on the basis of the mortgage deed. As the first defendant has no access with the first plaintiff from December 1983 and as she was having illicit intimacy with one Palanisamy, third party and the second plaintiff was born out of the said intimacy, the plaintiffs would not be entitled to maintenance or partition."

5. On the strength of the above pleadings, the trial court framed various issues. Before the trial Court, the first plaintiff examined herself as P.W.1 and marked Exs.A1 to A14. On the side of the defendants, the first defendant examined himself as D.W.1 and two other persons as D.W.2 and D.W.3, besides marking Exs.B1 to B3. As Court documents, Exs.C1 to C3 were marked.

6. The trial Court after considering the evidence, oral and documentary, adduced by both parties, dismissed the suit holding that the second plaintiff was not born to the first defendant and as such, the plaintiffs would not be entitled to maintenance as well as the relief of partition.

7. Aggrieved by the same, the respondents herein preferred A.S.No.40

of 1997 before the lower appellate Court.

8. After scrutinising the materials available on record and on hearing the counsel for parties, the lower appellate Court set aside the decree of the trial Court and allowed the appeal by granting the reliefs sought for in the suit to the plaintiffs by holding that the second plaintiff, minor son was born out of the wedlock between the first plaintiff and the first defendant. Hence, this second appeal by the defendants.

9. At the time of admission, this Court though did not incline to admit the second appeal, would issue notice of motion. The appellants also were directed to deposit the arrears of maintenance of Rs.52,000/-. After service of notice, the counsel for the respondents entered appearance. When the matter came up before this Court, both the counsel would agree for final disposal of the main appeal. Accordingly, they were heard.

10. The learned senior counsel for the appellants before adverting to the merits of the appeal, would point out that the lower appellate Court, while reversing the judgment and decree passed by the trial Court, has not adverted to the findings given by the trial Court and without giving any reason as to how the trial Court is wrong in giving such findings, the lower appellate Court reversed the judgment by giving independent reasonings for arriving at the conclusion and decreed the suit and the same is wrong, in view of the decisions in *B. PARVATHY v. RAMAKRISHNA MISSION* (2001(2) T.L.N.J.89 MADRAS) and *SANTHOSH HAZARI v. PURUTHOTTAM TIWARI* (2001(1) Supreme 642).

11. On the basis of this submission, the learned senior counsel would request this Court to remand the matter to the lower appellate Court for rehearing the matter to give a finding as to whether the reasonings for the findings given by the trial Court are valid or not.

12. On the other hand, the learned counsel for the respondents would submit that without remitting the matter for fresh hearing by the lower appellate Court, this Court may consider the evidence adduced by both parties in entirety and come to the conclusion. For this course, the senior counsel for the appellants would agree. Therefore, typed set containing the oral and documentary evidence adduced before the trial Court has been filed.

13. The senior counsel has raised the following substantial questions of law in the memorandum:

1) Is not the first appellant proved non-access between the parties to the marriage since December 1983 as contemplated under Section 11 2 of the Indian Evidence Act, 1872 by adducing Exs.A5 to A7, A9, A10 and Ex.B3 documents besides adducing oral evidence D.W.2 to D.W.3 to prove that the second respondent was not born to him out of the wedlock?

2) Whether the lower appellate Court is right in awarding maintenance, when the first respondent herein has failed to plead or prove any of the ingredients as contemplated under Sec.18(2) of the Hindu Adoptions and Maintenance Act, 1956 against the first appellant herein?

3) Whether the lower appellate Court erred in law and misdirected itself in granting a decree for partition of the suit properties when the second respondent herein is proved not to be born out of the wedlock between the first appellant and the first respondent herein?

4) Is not the Registered Partition Deed Ex.A8 dated 07-10-1987 entered into among the co-sharers is valid and binding upon the second respondent when in law, even assuming without admitting that he is entitled to a share, he is entitled to half-share only in the properties allotted to the first appellant herein under the said partition?

14. Elaborating these questions of law, Mr.S.V.Jayaraman, the learned senior counsel appearing for the appellants would argue at length.

15. Mr.T. Murugamanickam, the learned counsel for the respondents also would point out the reasonings given in the judgment of the lower appellate Court and refer to various portions of the evidence and contend that the decree passed in favour of the plaintiffs/respondents is perfectly valid.

16. I have carefully scrutinised the rival contentions urged on either side and also gone through the entire records.

17. At the outset, I shall state that it is not correct to contend that the lower appellate Court has not adverted to findings given by the trial Court, while reversing its judgment and on the other hand, the lower appellate Court would refer to various findings and give reasons for coming to the conclusion that the plaintiffs are entitled to the reliefs sought for.

18. However, in view of the request made by the counsel for the appellants and the respondents, this Court has gone through the entire evidence available on record placed by both the parties. On a careful perusal of the records, I am constrained to hold that the plaintiffs would be entitled to the decree for maintenance and partition for the following reasons.

19. The marriage was held on 1.11.1982 between the first plaintiff and the first defendant. Admittedly, the marriage is still subsisting. It is the case of the plaintiffs that till June 1988, the first plaintiff was living with the first defendant in the matrimonial home and thereafter, she came and joined with her parents. The second plaintiff was born on 1.6.1988 as per Ex.A1.

20. According to the defendants, she was living with her husband, first defendant only till December 1983 and thereafter, she deserted the husband, the first defendant and joined the parents. It is also the case of the defendants that the first plaintiff had illicit intimacy with one Palanisamy who was working as a Teacher and out of the said intimacy, the second plaintiff was born in 1988. In short, it is pleaded by the defendants that from January 1984, there was no access between the first plaintiff and the first defendant and so, the second plaintiff born on 1.6.1988 had not born to the first defendant.

21. Once it is pleaded by the husband that the child was not born to him and that there was no access between the husband and wife when the pregnancy was conceived, it is for the first defendant to prove the same.

22. On 9.10.1987, the first plaintiff filed the earlier suit in O.S.No.1087 of 1987 and in the plaint Ex.A9, she asserted that she was living with her husband, the first defendant in the matrimonial home and her right of residence in the matrimonial home should not be disturbed by the defendants. Though in the written statement filed in O.S. No.1087 of 1987, the first defendant stated that she was living with her parents for the past 51 months, the suit was not contested by the defendants. Ultimately, the decree was passed in favour of the plaintiffs on 23.8.1989.

23. It is true that the said decree was sought to be set aside by the defendants by filing the applications to condone the delay and to set aside the ex parte decree. In the enquiry in those applications, the first defendant admitted that his wife and his son, the plaintiffs have left the house for living separately. Admittedly, those applications were ultimately dismissed. There is no challenge against the said order. Consequently, the decree has become final. Thus, it is clear from the plaint and decree Exs.A9 and A12 respectively that the first plaintiff stayed in the matrimonial home at least till the date of the suit i.e. 9.10.1987.

24. Apart from these documentary evidence, P.W.1 also would state in her evidence that she was living with the husband during the relevant period and due to the wedlock, the son was born at the hospital on 1.6.1988. She has also marked Ex.A1, birth certificate which would show that the son was born on 1.6.1988 and the father and mother of the child are Chikkaraj and Dhanalakshmi i.e. the first defendant and the first plaintiff. These materials which would indicate that the first plaintiff was living with the husband, the first defendant till the second plaintiff was born cannot be rejected as there is no valid reason for the same.

25. As noted above, with reference to the absence of access and intimacy of the first plaintiff with the said Palanisamy, the same have to be established only by the defendants. But, these aspects have not been established by the first defendant. In regard to intimacy with Palanisamy, the trial Court though dismissed the suit, held that the same was not true. The lower appellate Court on a careful scrutiny of the materials, found both the aspects had not been proved by the defendants.

26. According to D.W.1, the first defendant in his evidence, the first plaintiff lived with the first defendant only for three months subsequent to the marriage and due to enmity between his father-in-law and the first defendant over the execution of a decree in the mortgage deed executed by the first defendant, the first plaintiff voluntarily left the matrimonial home by deserting her husband and for the past eight years, she was living with one Palanisamy and as such, the second plaintiff was not born to him. In the cross-examination, he would state that he filed a petition for restitution of conjugal rights and the same was dismissed. But, the records would show that such an application was not filed, but he filed O.P.No.63 of 1987 for

divorce and the same was dismissed for default on 12.12.1988. This is Ex.A2 . Prior to this, he sent a legal notice on 12.11.1987 to the first plaintiff seeking for consent for divorce. Ex.A5 is the notice. The reply Ex.A6 was sent by the first plaintiff on 17.11.1987. After receipt of the reply, on 23.11.1987, the first defendant sent a rejoinder Ex.A7. In all these documents, namely, the legal notice Ex.A5 sent on 12.11.1987 and the rejoinder Ex.A7 sent by the first defendant on 23.11.1987 and in the petition in O.P.No.63 of 1987 seeking for divorce, he never whispered that she was having illicit intimacy with Palanisamy and therefore, he sought divorce. Only for

the first time, in the written statement filed in the present suit on 4.2.1991, he mentioned that the child was born to the first plaintiff due to illicit intimacy with Palanisamy.

27. D.W.1, the first defendant would specifically state in the cross-examination of his evidence that he sent the notice through his Lawyer Anandan asking her to come and join with him to lead the matrimonial life, however, she did not accede to come. D.W.3 would state that there was a panchayat and in the panchayat, P.W.1, the first plaintiff told panchayatdars that she would not agree for joining with her husband. It is specifically stated by both D.W.2 and D.W.3 that P.W.1 was having intimacy with one Palanisamy from 1985. There is no dispute that both D.Ws.2 and 3 are closely related to D.W.1, the first defendant. The above evidence adduced by the defendants is not on the basis of any documentary evidence. In fact, the documentary evidence discloses the defendants did not take that stand. As such, the oral evidence of defendants is against their own documents filed in this case.

28. The first defendant in his evidence would state that even before he sent a notice Ex.A5 through Advocate Anandan, he knew that both the first plaintiff and the said Palanisamy had illicit intimacy. If this statement of D.Ws.1 to 3 is true, certainly, D.W.1 would have mentioned the same either in the petition in O.P.No.63 of 1987 seeking for divorce or in the legal notice Ex.A5 and A7 sent on 12.11.1987 and 23.11.1987. Hence, it has to be held that both the absence of access and illicit intimacy with Palanisamy have not been proved by the defendants.

29. According to the first defendant as D.W.1, the first plaintiff was living separately for 14 years. There is no dispute in the fact that the plaintiff filed a suit on 9.10.1987 in O.S.No.1087 of 1987 contending that she has been living with her husband in the matrimonial home and as such, her right of residence should not be disturbed and the suit has been decreed ex parte in favour of the plaintiff.

30. Prior to the filing of the suit, i.e. on 9.10.1987, the first defendant did not make any effort to get back his wife to the matrimonial home. In other words, prior to 9.10.1987, no notice was sent by the first defendant to the first plaintiff asking for joining him. Though he stated in his evidence as well as in the petition before Court for restitution of conjugal rights that he sent a notice, such a statement has not been proved, as factually the said statement is untrue.

31. In the evidence, the first defendant would state that she was living separately for 14 years. In Ex.A5, the notice issued on 12.11.19 87 by the first defendant, it is stated that she was living separately for 46 months. As such, the statement that she was living separately for 14 years, even though the said oral evidence was adduced by D.W.1 in 1996, is not correct. Therefore, there is no consistent evidence adduced by the defendants in regard to the absence of access for 14 years.

32. Though the suit was filed on 9.10.1987 stating that she is in the matrimonial home, in the legal notice Ex.A5 issued by the first defendant on 12.11.1987, he did not mention about the intimacy with third party. Only on 24.11.1987, the first defendant filed a petition in O.P.No.63 of 1987 seeking for divorce without mentioning about the intimacy with third party and the same was also dismissed on 12.12.198 8 and when the application was filed by the first defendant to restore the same, the said petition also was dismissed on 8.8.1991.

33. The trial Court having held that the illicit intimacy with Palanisamy was not proved, ought to have considered the decree passed in O.S.No.1087 of 1987 in favour of the plaintiff giving the right of residence to the plaintiff to stay in the matrimonial home along with the husband and held that the absence of access also was not established by the defendants. On the other hand, the lower appellate Court has dealt with each and every aspect of the matter and rendered a correct factual finding that the child, the second plaintiff was born only to the first defendant through the first plaintiff and as such, the second plaintiff is entitled to the share as decreed by the lower appellate Court.

34. In view of the above discussion, the second appeal is dismissed as there is no sufficient material to substantiate the substantial questions of law on the basis of which the arguments were placed by the senior counsel for the appellants. No costs.

21-11-2002

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Internet:Yes

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To

1) The II Additional District Judge, Erode.

2) The Subordinate Judge, Gobichettipalayam (with records).

3) The V.R. Section, High Court, Madras.

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